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**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION**

CENTER FOR ENVIRONMENTAL  
HEALTH, et al.,

Plaintiffs,

v.

ANDREW WHEELER,<sup>1</sup> in his official  
capacity as Acting Administrator of the  
U.S. Environmental Protection Agency, et  
al.,

Defendants.

CASE NO. 4:18-cv-03197-SBA

**NOTICE OF MOTION AND MOTION TO  
DISMISS SECOND AMENDED  
COMPLAINT**

**Date:** June 12, 2019

**Time:** 2:00 p.m.

**Location:** Oakland Courthouse, 1300 Clay  
Street, Courtroom 210, 2<sup>nd</sup> Floor

<sup>1</sup> Substituted pursuant to Federal Rule of Civil Procedure 25(d).

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**List of Exhibits to Federal Defendants' Motion to Dismiss**

<b>Exhibit</b>	<b>Description</b>
A	<i>Center for Biological Diversity v. U.S. Fish &amp; Wildlife Serv.</i> , Case No. 11-cv-5108 (N.D. Cal.), ECF No. 87, Stipulation Amending Original Stipulated Settlement and Order (July 28, 2014).
B	Letter from EPA to FWS, Initiation of Formal Consultation re: Potential Effects of Pesticides Registered Under FIFRA (Jan. 18, 2017).
C	Letter from FWS to EPA, Request for Additional Information Necessary to Complete Consultation and for Extension (Nov. 14, 2017).
D	Letter from EPA to FWS, Agreeing to Request for Additional Information Necessary to Complete Consultation and for Extension (Nov. 17, 2017).
E	Letter from FWS to EPA, Clarifying Request for Additional Information and for Extension (Dec. 17, 2017).
F	Document Provided by EPA to FWS re: Chlorpyrifos, Malathion, and Diazinon BiOp Applicants (Jan. 29, 2018).
G	EPA Memorandum re: Malathion (057701) National and State Use and Usage Summary (Mar. 28, 2018).
H	Letter from FWS to Ctr. for Biological Diversity, Re: Notice of Violations of the Endangered Species Act Concerning Registration of Pesticide Products Containing Malathion (May 18, 2018).
I	Letters from FWS to Drexel Chemical Company, FMC Corp., and Loveland Products, Re: Request for Consent to Extension to Complete Consultation (Oct. 12, 2018).
J	Letter from FWS to EPA, Re: Request for Consent to Extension to Complete Consultation (Oct. 15, 2018).
K	Email from EPA to FWS, Consent for Extension to Complete Consultation (Oct. 17, 2018).
L	Letter from FMC Corp. to FWS Re: Consent to Extension to Complete Consultation (Oct. 23, 2018)
M	Letter from Loveland Products to FWS Re: Consent to Extension to Complete Consultation (received Oct. 25, 2018).
N	Letter from Drexel Chemical Company to FWS Re: Consent to Extension to Complete Consultation (received Oct. 26, 2018).
O	Declaration of Marietta Echeverria
P	Declaration of Gary Frazer



PLEASE TAKE NOTICE that on June 12, 2019, at 2:00 p.m., or as soon thereafter as counsel may be heard, in the courtroom of the Honorable Sandra Brown Armstrong, located in the United States District Court for the Northern District of California, Oakland Courthouse, 1301 Clay Street, Oakland, CA 94612, the United States will and hereby does move the Court to issue an order dismissing with prejudice the claims against the U.S. Fish and Wildlife Service (“FWS”) and the U.S. Environmental Protection Agency (“EPA”) set forth in the Second Amended Complaint (ECF 43) (“Complaint”). This motion is made on the following grounds:

First, the Court lacks subject matter jurisdiction over the claims in the Complaint because Plaintiffs lack standing. *See* Fed. R. Civ. P. 12(b)(1). Second, the Court lacks subject matter jurisdiction over the Second Claim because it fails to allege final agency action under the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(2), and fails to state a claim on which relief can be granted for unlawful withholding or unreasonable delay of agency action under APA Section 706(1). *See* Fed. R. Civ. P. 12(b)(1), (6). Third, the Court lacks subject matter jurisdiction over the allegations in the First Claim because EPA and FWS are complying with their ESA procedural obligations, thus that aspect of the claim is moot. Fed. R. Civ. P. 12(b)(1).

Federal Defendants’ Motion is based on this Notice of Motion, the attached Memorandum of Points and Authorities, all of the pleadings, filings, and records in this proceeding, all other matters of which the Court may take judicial notice, and any argument or evidence that may be presented to or considered by the Court prior to its ruling.

## **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

### **I. INTRODUCTION**

Plaintiffs allege that FWS and EPA have failed to comply with the ESA, 16 U.S.C. § 1531 et seq., with respect to registration or reregistration actions under the Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA”), 7 U.S.C. § 136 et seq., of 21 pesticide products containing the active ingredient malathion because EPA failed to complete consultation with FWS under ESA Section 7. As a threshold matter, the Court lacks subject matter jurisdiction over the entire Complaint because Plaintiffs have failed to allege facts to establish that they have standing to challenge EPA’s actions regarding the 21 malathion-containing pesticide products at

1 issue. Alternatively, the Court lacks subject matter jurisdiction over the alleged violations of  
 2 APA Section 706(2), and should dismiss the alleged violations of APA Section 706(1) for failure  
 3 to state a claim on which relief can be granted. Furthermore, as Plaintiffs acknowledge, the  
 4 agencies currently are engaged in ESA consultation and have been since January 2017, in a  
 5 process that has raised complex legal and policy issues that the agencies continue to address. The  
 6 agencies initially anticipated that the ESA consultation would be completed by December  
 7 2017—a timeframe inherited from settlement of an earlier lawsuit brought by one of the  
 8 Plaintiffs in this case. But late in 2017, FWS determined that additional data would provide a  
 9 better information base for its biological opinion. In October 2018, FWS requested that EPA and  
 10 the technical registrants (which produce malathion products that are solely used to manufacture  
 11 or formulate other pesticide products) of the products under review agree to extend ESA  
 12 consultation to March 2021, explaining the reasons why a longer period was required and setting  
 13 out the information and analysis that FWS needs to complete the consultation. The consultation  
 14 is ongoing, the agencies have met or are meeting their procedural obligations and, therefore,  
 15 Plaintiffs’ claim that FWS and EPA have committed procedural violations of ESA Section  
 16 7(a)(2) is moot because there is no effective relief for the Court to grant.

## 17 **II. STATUTORY BACKGROUND**

18 The ESA provides for the listing of species as threatened or endangered. 16 U.S.C.  
 19 § 1533. The Secretary of Interior administers the ESA through FWS and is responsible for  
 20 implementing the ESA with respect to certain species—generally, listed terrestrial and inland  
 21 fish species.<sup>2</sup> 16 U.S.C. § 1532(15); 50 C.F.R. §§ 17.11, 402.01(b). ESA Section 7 directs each  
 22 federal agency to insure, in consultation with FWS (“the consulting agency”), that “any action  
 23 authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued  
 24 existence of” any listed species or destroy or adversely modify designated critical habitat. 16  
 25 U.S.C. § 1536(a)(2). For the purposes of consultation, “[a]ction” is defined as “all activities or  
 26

27  
 28 <sup>2</sup> The Secretary of Commerce also administers the ESA (through the National Marine Fisheries Service (“NMFS”)) and has responsibility for most listed marine species.

1 programs of any kind authorized, funded, or carried out, in whole or in part, by Federal  
 2 agencies.” 50 C.F.R. § 402.02. If the agency proposing the relevant action (the “action agency”)  
 3 determines that the action “may affect” listed species or critical habitat, the action agency must  
 4 pursue consultation with the consulting agency. 50 C.F.R. §§ 402.13, 402.14; *see also id.* §  
 5 402.46. Formal consultation is required unless the action agency determines, with the consulting  
 6 agency’s written concurrence, that the proposed action is “not likely to adversely affect” a listed  
 7 species or critical habitat. *Id.* §§ 402.14(b)(1), 402.13(a). After initiation of consultation, the  
 8 action agency shall not make any irreversible or irretrievable commitment of resources which  
 9 has the effect of foreclosing the formulation or implementation of any reasonable and prudent  
 10 alternative measures which would not violate ESA Section 7(a)(2). 16 U.S.C. § 1536(d). If  
 11 formal consultation is required, the consulting agency will prepare a biological opinion stating  
 12 whether the proposed action “is likely to jeopardize the continued existence of listed species or  
 13 result in the destruction or adverse modification of critical habitat.” 50 C.F.R. § 402.14(g)(4).

14 The ESA establishes timelines for the consultation process. Consultation shall be  
 15 concluded within 90 days of the date on which it is initiated, or within such other period as  
 16 mutually agreeable to the consulting and action agencies. 16 U.S.C. § 1536(b)(1)(A). When the  
 17 action under review involves a permit or license applicant, the consulting agency and the action  
 18 agency may not agree to conclude the consultation in a period exceeding 90 days unless the  
 19 consulting agency, before the close of the 90th day, obtains the consent of the applicant “if the  
 20 consultation period proposed to be agreed to will end 150 or more days after the date on which  
 21 consultation was initiated.” *Id.* § 1536(b)(1)(B)(ii). In seeking the applicant’s consent, the  
 22 consulting agency must provide a written statement to the applicant setting forth the reasons why  
 23 a longer period is required, the information that is required to complete the consultation, and the  
 24 estimated date on which consultation will be completed. *Id.* § 1536(b)(1)(B)(i)(I)-(III). The  
 25 agencies may mutually agree to further extensions, provided that the consulting agency obtains  
 26 the consent of the applicant before the end of the initial extension. *Id.* § 1536(b)(1)(B)(ii).

### 27 **III. FACTUAL AND PROCEDURAL BACKGROUND**

28 The background for this case began in 2011, with the filing of an earlier lawsuit in this

1 Court, captioned *Center for Biological Diversity v. U.S. Fish & Wildlife Service*, Case No. 11-  
 2 CV-5108-JSW (N.D. Cal.) (“the 2011 Litigation”). The complaint in that case alleged that FWS  
 3 and EPA violated ESA Section 7, the ESA’s implementing regulations, and the APA, 5 U.S.C. §  
 4 551 et seq., by their alleged failure to complete consultation on the potential impacts of 64  
 5 pesticides that EPA had determined “may affect” the California red-legged frog. In an amended  
 6 settlement agreement reached in that case, the parties agreed that, in light of recommendations  
 7 stated in a National Academy of Sciences report, “it would be more efficient for EPA and FWS  
 8 to consult on the potential effects that pesticides at issue in this case have on threatened and  
 9 endangered species nationwide, instead of limiting their consultation only to potential effects on  
 10 the California red-legged frog.” *See* Ex. A at 2. Under the amended settlement agreement, FWS  
 11 would have an opportunity to complete such nationwide consultations, but if it were unable to do  
 12 so, the parties could seek completion of the original consultations on the California red-legged  
 13 frog. *Id.* at 3. The amended settlement agreement provided for FWS and EPA to prepare an  
 14 estimated schedule for completing the nationwide consultations. *Id.* at 5-6. That estimated  
 15 schedule stated that a draft biological opinion relating to the registration review of malathion and  
 16 two other active ingredients would be released to the public in approximately May 2017 for a 60-  
 17 day comment period, and FWS estimated it would issue a final biological opinion by December  
 18 2017. This, of course, is the ongoing nationwide consultation that is the subject of this lawsuit.

19 On January 18, 2017, EPA submitted to FWS a biological evaluation (“BE”) regarding  
 20 the effects of malathion and two other active ingredients and requested initiation of consultation.  
 21 *See* Ex. B. The agencies did not, however, release a draft biological opinion to the public in May  
 22 2017 as initially anticipated by the amended settlement agreement in the 2011 Litigation. Rather,  
 23 on November 14, 2017, FWS wrote to EPA, requesting an extension of the consultation period  
 24 and that EPA provide additional information that FWS identified as necessary to complete  
 25 formal consultation. *See* Ex. C. Among the information FWS requested was the best scientific  
 26 and commercial data available regarding actual use of malathion, including extrapolation to areas  
 27 where actual use data does not exist or cannot be obtained. *Id.* FWS also sought analysis for each  
 28 chemical that eliminates geographic areas identified by EPA where the pesticides are not used

1 and use is not likely during the time period of the label authorization, or where listed species or  
 2 designated critical habitats would not otherwise be exposed to use of the pesticide. *Id.* As to  
 3 FWS's request to extend the consultation, FWS stated that it would work with EPA to establish a  
 4 schedule to complete consultation upon receipt of the requested information. *Id.*

5 On November 17, 2017, EPA responded, stating that it anticipated being able to provide  
 6 the information sought by FWS within six months and agreed that the consultation should  
 7 continue and "be extended as necessary, and that any required consent from any applicants be  
 8 obtained." *See* Ex. D. In subsequent correspondence, EPA identified three technical registrants  
 9 for malathion, i.e., the companies that produce malathion products that are solely used to  
 10 manufacture or formulate other pesticide products. *See* Ex. E & F. EPA also provided additional  
 11 usage data for malathion, and FWS has reviewed this information and continues to work with  
 12 EPA and staff from the U.S. Department of Agriculture to compile data on a more refined spatial  
 13 scale. Ex. G, O, P. More recently, FWS requested consent of EPA and the three technical  
 14 registrants for malathion to extend the date for completion of a draft biological opinion to EPA  
 15 for review and release for public comment to April 2020, and issuance of a final biological  
 16 opinion to March 2021. *See* Ex. I & J. EPA and the three technical registrants for malathion have  
 17 consented to the extension. *See* Ex. K-N; *see also* Ex. O & P.

18 In March 2018, Plaintiffs gave notice of intent to sue EPA and FWS. Compl., Ex. A. In  
 19 responding to Plaintiffs' notice, FWS explained that it needed additional information from EPA  
 20 and other stakeholders in order to understand the indirect effects of the action under review, and  
 21 that it was collaboratively developing methodologies to incorporate the data into the consultation  
 22 and effects analysis. Ex. H. Plaintiffs filed this lawsuit on May 30, 2018, ECF 1, and amended  
 23 their claims in July 2018. ECF 18. After Federal Defendants filed a motion to dismiss, Plaintiffs  
 24 again amended the Complaint with leave of Court on November 27, 2018. ECF 42, 43.

#### 25 **IV. STANDARD OF REVIEW UNDER FED. R. CIV. P. 12(b)(1) AND 12(b)(6).**

26 Federal Rule of Civil Procedure 12(b)(1) mandates the dismissal of a case where the  
 27 Court lacks subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1); *see also* Fed. R. Civ. P.  
 28 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court

1 must dismiss the action.”). The party seeking judicial review bears the burden of establishing that  
 2 a cause of action lies within the limited jurisdiction of the federal courts. *Kokkonen v. Guardian*  
 3 *Life Ins. Co.*, 511 U.S. 375, 377 (1994); *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir. 1986).  
 4 Where the court concludes that it lacks jurisdiction, it must dismiss the action without reaching  
 5 the merits of the complaint. *See High Country Res. v. FERC*, 255 F.3d 741, 747 (9th Cir. 2001).  
 6 When ruling on a motion to dismiss for lack of subject matter jurisdiction, the court takes the  
 7 allegations in the complaint as true, *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004), but  
 8 is not restricted to the face of the pleadings and “may review any evidence, such as affidavits and  
 9 testimony, to resolve factual disputes concerning the existence of jurisdiction.” *McCarthy v.*  
 10 *United States*, 850 F.2d 558, 560 (9th Cir. 1988); *see also Warren v. Fox Family Worldwide,*  
 11 *Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). “[B]ecause jurisdiction is a threshold question,  
 12 judicial economy demands that the issue be decided at the outset rather than deferring it until  
 13 trial, as would occur with denial of a summary judgment motion.” *Osborn v. United States*, 918  
 14 F.2d 724, 729 (8th Cir. 1990).

15 A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal  
 16 sufficiency of the claims asserted in a complaint. To survive a motion to dismiss under Rule  
 17 12(b)(6), “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to  
 18 relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl.*  
 19 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible when there are  
 20 sufficient factual allegations to draw a reasonable inference that the defendants have committed  
 21 the alleged violation. *Iqbal*, 556 U.S. at 678. While a court “must take all of the factual  
 22 allegations in the complaint as true,” it is “not bound to accept as true a legal conclusion couched  
 23 as a factual allegation,” and a “formulaic recitation of the elements of a cause of action” is not  
 24 enough. *Id.* (internal quotation marks omitted). “[C]onclusory allegations of law and  
 25 unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim.”  
 26 *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996) (citation omitted). A complaint  
 27 “may not simply recite the elements of a cause of action, but must contain sufficient allegations  
 28 of underlying facts to give fair notice and to enable the opposing party to defend itself

effectively.” *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

## V. ARGUMENT

### A. Plaintiffs Fail To Plead Facts Sufficient To Show Standing.

#### 1. Plaintiffs fail to plead facts to show their members have standing.

Standing is a threshold requirement in every civil action filed in federal court. U.S. Const., art. III, § 2, cl. 1; *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). To satisfy the Article III standing requirement at the motion to dismiss stage, a plaintiff must allege sufficient facts to show that: “(1) it has suffered an ‘injury in fact’ . . .; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (citing *Lujan*, 504 U.S. at 560-61).

Here, Plaintiffs have failed to allege facts demonstrating their interest in any particular species or geographical area affected by any particular pesticide product. To the contrary, the allegations in the Complaint state only that one or more of Plaintiffs’ members visit and recreate in Oregon’s Willamette Valley in the hopes of observing and photographing the endangered Fender’s blue butterfly. Compl., ¶ 23. Plaintiffs further allege that they are concerned about potential harm to the butterfly from insecticides that contain malathion, and that “one or more of the pesticide products containing malathion at issue [in the Complaint] are registered for use on many of the crops grown in the Willamette Valley.” *Id.* But these broad allegations lack any specificity about which of the products are approved for use in the Willamette Valley, much less that any of the products will be applied in such a way as to injure their members’ ability to enjoy the butterfly in that area. Indeed, the Complaint includes two manufacturing use products (Malathion 96.5% (EPA Reg. No. 19713-402) and Fyfanon Technical (EPA Reg. No. 4787-5)) that are used only in factories to produce the pesticide products that will be used by growers and others. Ex. O. Plaintiffs offer no explanation of how those two products (as opposed to end-use products which are ultimately made from them) could ever injure the butterfly, nor does the Complaint individually address any of the 21 challenged products whatsoever. At most, it alleges that it is possible that the products Plaintiffs have singled out could be applied in the Willamette

Valley, in or near habitat for the butterfly, which is too speculative and theoretical to establish standing. *Lujan*, 504 U.S. at 560-61, 566 (“[s]tanding is not ‘an ingenious academic exercise in the conceivable’”) (citation omitted); *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013) (party must demonstrate that its predicted injuries are “*certainly* impending,” which excludes injuries that are merely “possible”) (citations omitted).<sup>3</sup>

Plaintiffs also lack standing because their requested relief -- that the Court vacate the registration of products containing malathion, or order interim mitigation measures, until consultation is completed and EPA implements any necessary alternatives or measures to comply with the ESA -- will not redress their alleged injury. Compl., Prayer for Relief ¶ 5; *id.* ¶ 87 (seeking to curtail the use of malathion-containing products on a “wide variety of agricultural food and feed crops . . . [as well as] on cotton, ornamental plants and trees, non-crop areas, wasteland, and roadsides, among other uses”). The original registration actions for most products containing malathion occurred years ago and the statute of limitations on EPA’s action with respect to those products has expired. *Id.* ¶ 84; *see Dow AgroSciences v. NMFS*, 707 F.3d 462, 465 (4th Cir. 2013) (malathion first registered for use in 1956).

For the malathion products that are at issue in this case,<sup>4</sup> most of the challenged actions are EPA actions “reregistering” previously-registered pesticides. 7 U.S.C. § 136a-1; Compl., ¶ 84. Under FIFRA Section 4, a reregistration decision determines whether earlier-registered pesticides continue to meet the FIFRA standard for registration (whether the products cause unreasonable adverse effects on the environment) and, if not, to make the appropriate modifications to registrations. 7 U.S.C. §§ 136a-1(g)(2)(C), 136a(c)(5). A reregistration decision

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<sup>3</sup> Attached to the Complaint is a list of species that occur nationwide, but the Complaint is silent about which malathion products would allegedly be applied in the areas pertinent to the species, despite the fact that the product labels contain directions on specific areas in which the product can be applied. These facts cannot be presumed. *Whitmore v. Arkansas*, 495 U.S. 149, 155-56 (1990) (“[a] federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing”); *Iqbal*, 556 U.S. at 678 (Rule 8(a) “demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation”) (citations omitted).

<sup>4</sup> Eighteen of the 21 challenged actions in the Complaint are label amendments associated with the reregistration of existing pesticide products, rather than original registrations.



that a product may cause unreasonable adverse effects on the environment is not self-implementing under FIFRA: to modify a registration, EPA must take “appropriate regulatory action,” which can include actions “such as canceling, suspending, or restricting the pesticide, or imposing label changes.” *Reckitt Benckiser v. Jackson*, 762 F. Supp. 2d 34, 44 (D.D.C. 2011). In such circumstances, the registrant has multiple options, including remedying deficiencies with its product or demanding a hearing before an administrative law judge to present evidence and argue for continued registration of its product. 7 U.S.C. § 136d(b); 40 C.F.R. Part 164. The registrations remain in effect until such administrative processes are complete. *Id.* Vacating the reregistration actions as Plaintiffs request here would not have an impact on the registrations involved, but would instead result in a remand for new reregistration decisions with the relevant registrations remaining in place. Thus, an order in the form requested by Plaintiffs will not redress the broad injury they assert. *W. Watersheds Proj. v. Grimm*, 283 F. Supp. 3d 925, 940-41 (D. Idaho 2018) (alleged injury was not redressable because an injunction banning federal agency from killing wolves would not stop state agency from that same action).<sup>5</sup>

**2. Plaintiffs fail to allege sufficient facts to demonstrate organizational standing.**

Plaintiffs allege a second theory of standing, claiming that the agencies have caused injury to them by “frustrat[ing] the missions of the organizations to reduce the threat of malathion to the endangered species, the environment, and public health” and that they have “had to spend resources to counteract the failures of the EPA and [FWS] to ensure compliance with the ESA regarding pesticide registrations.” Compl., ¶ 24. These allegations are not sufficient to support the required elements for organizational standing. Courts have recognized that “[a]n organization suing on its own behalf can establish an injury when it suffered ‘both a diversion of its resources and a frustration of its mission.’” *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010) (quoting *Fair Housing of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002)); see *Havens Realty Corp. v. Coleman*,

<sup>5</sup> And, even if the Court could grant the relief sought as to the 21 products in the Complaint, other products not challenged in the Complaint remain available for use. Ex. O.

1 455 U.S. 363, 378-79 (1982). A plaintiff must allege “a concrete and demonstrable injury to its  
 2 activities, not simply a setback to the organization’s abstract social interests.” *Proj. Sentinel v.*  
 3 *Evergreen Ridge Apts.*, 40 F. Supp. 2d 1136, 1138 (N.D. Cal. 1999).

4 Plaintiffs’ allegations fall short of these requirements. To demonstrate that they have had  
 5 to divert resources, Plaintiffs must allege that they have had to expend additional resources in  
 6 performing their environmental mission and that “but for” the agencies’ failures, they would  
 7 have spent those resources to accomplish other aspects of their organizational missions. *Serv.*  
 8 *Women’s Action Network v. Mattis*, 320 F. Supp. 3d 1082, 1099 (N.D. Cal. 2018). Plaintiffs must  
 9 be specific in describing “(1) from what and (2) to what [their] resources have been allocated.”  
 10 *Id.* at 1100. No such allegations appear in the Complaint. To the contrary, Plaintiffs’ allegations  
 11 are conclusory, lack specificity, and offer no information about how Plaintiffs’ missions are  
 12 frustrated, or when or from where they have had to divert resources. While Plaintiffs allege that  
 13 one of them, the Center for Biological Diversity, has had to “spend resources” regarding Federal  
 14 Defendants’ compliance with the ESA regarding pesticide registrations, the listed activities  
 15 (preparing reports and press releases, providing expertise to the public, and tracking agency  
 16 compliance, all in relation to the ESA and listed species) are exactly the sort of work that form  
 17 the basis of the group’s primary mission. *E.g.*, Compl., ¶ 24 (“the mission of the Center for  
 18 Biological Diversity is species and habitat protection and work to achieve ESA safeguards for  
 19 those species”). The Complaint does not even minimally allege that Federal Defendants’ conduct  
 20 is causing any of the Plaintiffs to divert their limited resources, and that their work and  
 21 achievement of goals is more costly as a result. *E.g.*, *We Are Am. v. Maricopa County Bd. Of*  
 22 *Supervisors*, 809 F. Supp. 2d 1084, 1098 (D. Ariz. 2011). Moreover, the Complaint contains no  
 23 allegations that the specified activities have been a consequent drain on the organizations’  
 24 resources. *Havens*, 455 U.S. at 368. Plaintiffs have not demonstrated that they have suffered a  
 25 cognizable injury, and the Complaint should be dismissed.

26 **B. The APA Claims In The Second Claim Should Be Dismissed.**

27 **1. The Second Claim fails to allege final agency action.**

28 The APA authorizes a court to “hold unlawful and set aside agency action, findings, and

conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). To obtain judicial review under this section, a plaintiff must establish that the activity at issue is “final agency action.” *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 882 (1990). For an agency action to be considered final under the APA: (1) the action “must mark the consummation of the agency’s decisionmaking process,” and (2) it “must be one by which rights or obligations have been determined, or from which legal consequences will flow.” *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal citations and quotations omitted). The action “must not be of a merely tentative or interlocutory nature.” *Id.* The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties. *Indus. Customers of NW Utils. v. Bonneville Power Admin.*, 408 F.3d 638, 646 (9th Cir. 2005). Final agency action is a jurisdictional requirement. *Ukiah Valley Med. Ctr. v. FTC*, 911 F.2d 261, 264 n.1 (9th Cir.1991).

The Second Claim asserts that the extension of the ongoing consultation violates APA Section 706(2) because it is arbitrary and capricious. Compl., ¶ 98. But extending the consultation is not final agency action that is reviewable under the APA. To the contrary, it is an interim step in FWS’s completion of a biological opinion on the effects of EPA’s registration of the malathion-containing pesticide products listed in EPA’s BE.<sup>6</sup> *Ecology Ctr. v. U.S. Forest Serv.*, 192 F.3d 922, 925 (9th Cir. 1999); *see Bal v. Sessions*, 292 F. Supp. 3d 604, 607 (E.D. Pa. 2017) (termination of asylum status was not final agency action but instead “an intermediate step in a multi-stage administrative process”). FWS’s request to extend the consultation (and EPA’s consent to that request) clearly is not the consummation of any decisionmaking. Rather, extending the consultation indicates only that more time is needed to reach a final decision.

Further, Plaintiffs do not identify any rights or obligations that have been determined as a result of the extension because there are none. *E.g., Ecology Ctr.*, 192 F.3d at 925-26 (inadequate

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<sup>6</sup> In contrast, the issuance of a biological opinion and an accompanying incidental take statement are considered final agency actions. *Bennett*, 520 U.S. at 178; *see also Ariz. Cattle Growers’ Ass’n v. U.S. Fish & Wildlife Serv.*, 273 F.3d 1229, 1235 (9th Cir. 2001). Here, FWS has not issued a draft biological opinion, much less a final biological opinion. Ex. P ¶ 4.

1 monitoring of Forest Plan-specified resource parameters was not a final agency action because it  
 2 was several steps removed from any final agency action and did not have legal consequences  
 3 flowing from its completion or rights arising from it). Extending the consultation timeframe does  
 4 not add or take away EPA's rights as the action agency, as its obligations remain the same: to  
 5 comply with ESA Section 7(a)(2) by avoiding jeopardy and the mandates in ESA Section 7(d).<sup>7</sup>  
 6 Plaintiffs' Second Claim should be dismissed because the extension of the consultation period is  
 7 not final agency action under Section 706(2) of the APA.

8 **2. Plaintiffs' "unlawful withholding or unreasonable delay" claim fails to state**  
 9 **a claim on which relief can be granted.**

10 The APA provides that courts shall "compel agency action unlawfully withheld or  
 11 unreasonably delayed." 5 U.S.C. § 706(1). To establish a right of review under section 706(1), a  
 12 plaintiff must identify a statutory provision mandating agency action. *Ctr. for Biological*  
 13 *Diversity v. Veneman*, 335 F.3d 849, 854 (9th Cir. 2003). To reach the issue of whether an  
 14 agency has unlawfully withheld or unreasonably delayed an action, a court must determine  
 15 whether the plaintiff has sufficiently alleged a failure to perform a mandatory duty or whether  
 16 the plaintiff is attempting to "evade the finality requirement with complaints about the  
 17 sufficiency of an agency action 'dressed up as an agency's failure to act.'" *Ecology Ctr.*, 192  
 18 F.3d at 926 (quoting *Nevada v. Watkins*, 939 F.2d 710, 714 n. 11 (9th Cir. 1991)).

19 Here, extension of the consultation period does not constitute unlawful withholding or  
 20 unreasonable delay of agency action. Compl., ¶ 109. When evaluating whether agency action has  
 21 been unreasonably delayed, courts look to whether the statute sets a timeframe or a time limit.  
 22 *E.g., Or. Nat. Res. Council v. Turner*, 863 F. Supp. 1277, 1284 (D. Or. 1994) (that Congress had  
 23 not set a time limit for specified action "must be considered in determining whether a delay is  
 24 unreasonable"). ESA Section 7(b)(1) establishes timelines for the consultation process, but those  
 25 timelines may be extended if both the action agency and any applicants consent. When seeking  
 26

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27 <sup>7</sup> The Complaint already asserts such claims, with the First Claim alleging that EPA has  
 28 violated its substantive obligations under ESA Section 7(a)(2), and the Third Claim alleging that  
 EPA has violated ESA Section 7(d).

1 that consent, Section 7(b)(1) requires only that the request be in writing and set forth the reasons  
 2 why a longer period is required, the information that is required to complete the consultation, and  
 3 the estimated date on which the consultation will be completed. *See also* 50 C.F.R. § 402.14(e);  
 4 51 Fed. Reg. 19,926, 19,951 (June 3, 1986). FWS explained why a longer period is required and  
 5 identified the information that is required to complete the consultation, first in its November  
 6 2017 correspondence to EPA and most recently in its correspondence to EPA and the technical  
 7 registrants.<sup>8</sup> *See* Ex. C, H-J. FWS has “the responsibility to alert the Federal agency and any  
 8 applicant of areas where additional data would provide a better information base from which to  
 9 formulate a biological opinion.” 51 Fed. Reg. at 19,951-52. This is consistent with FWS’s  
 10 obligation to use the best available scientific and commercial data when formulating a biological  
 11 opinion. *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 602 (9th Cir. 2014).  
 12 FWS’s request to extend the consultation is grounded in these principles. To require FWS to  
 13 proceed without the data sought, or to find that FWS acted in an arbitrary and capricious manner  
 14 by requesting to extend the consultation to obtain and review data it deems necessary, would  
 15 increase the risk of producing an inadequate biological opinion, “and present more delay and  
 16 greater danger to the species which the law seeks to protect.” *S. Yuba River Citizens League v.*  
 17 *NMFS*, 2011 WL 1636235, at \*3 (E.D. Cal. Apr. 29, 2011) (reasonable for agencies to  
 18 restructure previous analytical framework and seek independent peer review of biological  
 19 opinion); *cf. Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 67 (2004) (APA does not  
 20 contemplate “pervasive oversight by federal courts over the manner and pace of agency  
 21 compliance with . . . congressional directives”).

22 Plaintiffs may disagree that more information is pertinent to the consultation, but this  
 23 disagreement cannot form the basis of a claim that FWS and EPA have violated the APA. A  
 24 court is not authorized under Section 706(1) to micro-manage a federal agency’s performance of  
 25 its duties, as its power is limited to ordering an agency to perform a discrete duty required by  
 26

27  
 28 <sup>8</sup> As Plaintiffs acknowledge in the Complaint, it was always anticipated that the ongoing  
 consultation would be completed on an extended schedule. Compl., ¶¶ 61-62.

law. *Firebaugh Canal Water Dist. v. U.S.*, 819 F. Supp. 2d 1057, 1074 (E.D. Cal. 2011). Section 706(1) does not provide a cause of action for suits that allege “[g]eneral deficiencies in compliance” or seek “wholesale improvement of [a government] program by court decree.” *Norton*, 542 U.S. at 64, 66. Plaintiffs clearly want FWS to complete consultation more quickly than presently planned, Compl., ¶ 102, but their preference lacks legal recourse. FWS has complied with the ESA and the extension cannot form the basis of a claim under Section 706(1).

Finally, the Second Claim must be dismissed as it pertains to EPA. An unlawful withholding or unreasonable delay claim must allege that an agency has failed to take a discrete action that it is required to take. *Norton*, 542 U.S. at 62. FWS requested that EPA agree to extend the consultation. Whether EPA consented (as it did) or declined to consent, whichever course it chose was vested fully within the agency’s discretion. And, having consented, EPA has not unlawfully withheld or unreasonably delayed any action. With their request that the Court order the agencies to complete the consultation, it is clear that Plaintiffs’ real dispute is whether EPA has complied with ESA Section 7(a) and 7(d). But the First and Third Claims encompass these alleged violations, and EPA’s consent to the extension is not the proper basis of an APA Section 706(1) claim. The Second Claim should be dismissed.

### **C. EPA and FWS Have Complied With Their Section 7 Procedural Obligations.**

Plaintiffs allege in their First Claim that EPA and FWS violated their procedural duties under ESA Section 7(a)(2), but this aspect of the First Claim is moot. “The basic question in determining mootness is whether there is a present controversy as to which effective relief can be granted.” *Feldman v. Bomar*, 518 F.3d 637, 642 (9th Cir. 2008). Under ESA Section 7(a)(2), FWS has a duty to consult with and assist other federal agencies’ efforts to insure that any actions authorized, funded, or carried out by them are not likely to jeopardize endangered species and or adversely modify critical habitat. 16 U.S.C. § 1536(a)(2). The separate obligations of the consulting and action agencies are explained in the Final Rule establishing the ESA’s implementing regulations: FWS “performs strictly an advisory function under section 7,” while each “Federal agency makes the ultimate decision as to whether its proposed action will satisfy” ESA Section 7. 51 Fed. Reg. at 19,928; see *Salmon Spawning & Recovery All. v. Gutierrez*, 545

1 F.3d 1220, 1227 (9th Cir. 2008) (ESA Section 7 substantive duties are separate from agency's  
 2 responsibility to comply with the procedures required by ESA Section 7). FWS currently is  
 3 engaged in completing its procedural duties. Sections III & V.B, *supra*. FWS received EPA's  
 4 request to initiate formal consultation and BE in January 2017. FWS is in the process of  
 5 preparing its biological opinion as to whether EPA's action would likely adversely affect listed  
 6 species or adversely modify critical habitat. 50 C.F.R. § 402.14(h). An order directing FWS to  
 7 comply with its Section 7(a)(2) procedural obligations would provide no effective relief.

8 The First Claim also is moot as it pertains to EPA's alleged failure to comply with ESA  
 9 Section 7(a)(2)'s procedural requirements. When an action agency such as EPA determines that  
 10 its action "may affect" listed species or critical habitat, it must pursue consultation with the  
 11 consulting agency. 50 C.F.R. §§ 402.13, 402.14, 402.46. EPA has met those procedural  
 12 requirements: in its January 2017 BE, it determined that its action "may affect" listed species,  
 13 and it initiated formal consultation. Compl., ¶¶ 61, 91. EPA has no additional procedural  
 14 obligations under the ESA, nor do Plaintiffs allege any. It would serve no purpose to order EPA  
 15 to do what it already has done. *Greenpeace Found. v. Mineta*, 122 F. Supp. 2d 1123, 1127-28 (D.  
 16 Haw. 2000). Indeed, other courts have found claims alleging failure to consult pursuant to ESA  
 17 Section 7(a)(2) moot where the action agency has initiated consultation. *E.g., Am. Littoral Soc'y*  
 18 *v. EPA*, 199 F. Supp. 2d 217, 245-47 (D.N.J. 2002) (failure-to-consult claim was moot where  
 19 agency had sent letters seeking consultation because no further effectual relief could be granted);  
 20 *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 82 F. Supp. 2d 1070, 1079 (D. Ariz. 2000)  
 21 (failure-to-consult claim was moot where agencies had begun consultation, and noting the  
 22 "settled rule against issuing advisory opinions"); *S. Utah Wilderness All. v. Smith*, 110 F.3d 724,  
 23 727-28 (10th Cir. 1997) (dismissing suit where consultation was completed while lawsuit was  
 24 pending because "[a]n injunction ordering consultation is no longer warranted"). FWS and EPA  
 25 are complying with their ESA procedural obligations, and this aspect of Plaintiffs' First Claim is  
 26 moot. Thus, the Court should dismiss the First Claim of the Complaint as it relates to the ESA  
 27 procedural claims against both agencies.

1 **VI. CONCLUSION**

2 For all these reasons, the Court should dismiss the Second Amended Complaint.

3 Dated: February 15, 2019

Respectfully submitted,

4 JEAN E. WILLIAMS

5 Deputy Assistant Attorney General  
6 Environment & Natural Resources Division

7 SETH M. BARSKY, Chief

MEREDITH L. FLAX, Assistant Chief

8 /s/ Alison C. Finnegan

9 ALISON C. FINNEGAN, Trial Attorney

10 U.S. Department of Justice

Environment & Natural Resources Division

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1 **MEET AND CONFER CERTIFICATION**

2 Pursuant to the Court's Standing Order (effective October 1, 2018), I hereby certify that I  
3 met and conferred with counsel for Plaintiffs, Stephanie Parent and Jonathan Evans, as well as  
4 counsel for Intervenor-Defendant, by telephone on December 21, 2018, regarding the contents of  
5 this motion and that counsel for Plaintiffs did not consent to the relief sought.

6 /s/ Alison C. Finnegan  
7

8 **CERTIFICATE OF SERVICE**

9 I hereby certify that on February 15, 2019, I electronically filed the foregoing with the  
10 Clerk of the Court via the CM/ECF system, which will send notification of such to the attorneys  
11 of record.

12 /s/ Alison C. Finnegan  
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*Attorneys for Defendants*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION**

CENTER FOR ENVIRONMENTAL  
HEALTH, et al.,

Plaintiffs,

v.

ANDREW WHEELER, in his official  
capacity as Acting Administrator of the  
U.S. Environmental Protection Agency, et  
al.,

Defendants.

CASE NO. 4:18-cv-03197-SBA

**Date:** June 12, 2019

**Time:** 2:00 p.m.

**Location:** Oakland Courthouse, 1300 Clay  
Street, Courtroom 210, 2<sup>nd</sup> Floor

**[PROPOSED] ORDER IN FAVOR OF FEDERAL DEFENDANTS**

Federal Defendants' Motion to Dismiss Second Amended Complaint came on regularly for hearing before this Court on June 12, 2019. After considering the moving and opposing papers, arguments, and all other matters presented to the Court,

1 IT IS HEREBY ORDERED AND ADJUDGED that Federal Defendants' Motion is  
2 GRANTED. It is further ORDERED that judgment is entered in favor of the U.S. Fish and  
3 Wildlife Service, David Bernhardt, in his official capacity as Acting Secretary of the Interior, the  
4 Environmental Protection Agency, and Andrew Wheeler, in his official capacity as the Acting  
5 Administrator for the Environmental Protection Agency, and that Plaintiffs' Second Amended  
6 Complaint be DISMISSED in its entirety with prejudice.

7  
8 DATED: \_\_\_\_\_

\_\_\_\_\_  
HONORABLE SAUNDRA BROWN ARMSTRONG  
United States Senior District Judge